SUPREME COURT, U.S.
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No. 79-1325

In the Supreme Court of the United States

OCTOBER TERM, 1979

SUE CLARK,

Appellant,

vs.

STATE OF INDIANA and LAKE COUNTY PROSECUTOR,

Appellees.

On Appeal From the Supreme Court of Indiana

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

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SUE CLARK,

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STATE OF INDIANA and LAKE COUNTY PROSECUTOR,

Appellees.

On Appeal From the Supreme Court of Indiana

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Supreme Court of Indiana entered on December 3, 1978, which upheld the constitutionality of the Indiana Public Indecency statute, Indiana Code 35-45-4-1 (1978 ed.) thus reversing a trial court judgment that the statute was in violation of the First Amendment of the Constitution of the United States for the reason that the statute was overbroad on its face.

THE OPINIONS BELOW

The Superior Court of Lake County, Indiana, Civil Division, Room Number Three, issued a written judgment and decree which is not reported but which is printed as Appendix B this Statement. The opinion of the three Justice majority of the Supreme Court of Indiana is reported at ..... Ind ....., 397 NE2d 580, and is printed as Appendix A to this Statement. Also found in Appendix A are two dissenting opinions issued by members of the Supreme Court of Indiana.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Appellant filed her complaint in the Superior Court of Lake County, Indiana, on November 17, 1977 and amended that complaint on November 28, 1977. The complaint sought a declaratory judgment that Indiana Code 35-45-4-1 (a) (3) (1978 ed.) is unconstitutional. The trial court held in favor of the Appellant and in doing so entered a written judgment and decree on May 9, 1978, which declared the statute unconstitutional because of overbreadth.

That decision was appealed by the Attorney General for the State of Indiana to the Supreme Court of Indiana. On December 3, 1979, the Supreme Court of Indiana reversed the judgment of the trial court and upheld the statute as constitutional in a 3-2 decision. The Justices in the minority each filed a dissenting opinion.

Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Indiana on February 25, 1980.

This cause presents a justiciable issue. There is a real and substantial controversy present between the parties.

The Appellant's right to exercise her First Amendment rights of freedom of speech and expression by dancing in the nude is directly in conflict with the new Indiana Public Indecency statute I.C. 35-45-4-1 (a) (3) which went into effect on October 1, 1977. The Appellant claims that the statute is overbroad on its face while the Appellee claims overbreadth is not at issue because the activity proscribed is conduct rather than speech. The Appellant relies upon *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); the First Amendment and the Fourteenth Amendment for her claim. The question was raised below and passed upon by the State Court. That the Appellant faces a continuing threat of prosecution is not questioned because the nature of the Appellant's activity is such that it would attract sufficient attention of the authorities to prompt prosecution under the statute. In fact, one of the companion cases decided by the Supreme Court of Indiana with that of this Appellant arose from a situation where eleven people had criminal charges filed against them under the statute in question.

The question raised here is not hypothetical nor is it contingent. What the Appellant desires and proposes to do is not speculative. She engaged in this proscribed activity for several years as part of the sole manner in which she earned her livelihood and did so until October 1, 1977, when the statute took effect. The threat of criminal prosecution is not vague or conditional, rather it is actual, specific and immediate. Furthermore, the threat is a continuing one and remains as alive now as it has been at each other stage of this litigation. The Appellant does not seek an advisory opinion. She seeks to have this important constitutional question settled insofar as her claimed right is concerned without subjecting herself to the risk of fine or imprisonment.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Indiana on appeal is conferred by Title 28, United States Code, Section 1257 (2). Cases which sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case include *Nashville C. and St. L. R. Co.* v. *Wallace,* 53 Sup Ct 345, 288 US 249, 77 L. Ed 730 (1933); *Grayner* v. *City of Rockford,* 92 Sup Ct 2294, 408 US 104, 33 L. Ed 2d 222 (1972).

STATUTORY PROVISIONS INVOLVED

The validity of Indiana Code, Section 35-45-4-1 (a) (3) (1978 ed) is here involved. The full text of that statute is as follows:

> 35-45-4-1. Public indecency.—(a) A person who knowingly or intentionally, in a public place:
>
> (1) Engages in sexual intercourse;
>
> (2) Engages in deviate sexual conduct;
>
> (3) Appears in a state of nudity; or
>
> (4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

A class A misdemeanor in Indiana carries a maximum penalty of imprisonment for a fixed term of not more than one year to which in addition may be added a fine of not more than $5,000.00. Indiana Code 35-50-3-2 (1978 ed.).

QUESTIONS PRESENTED BY THE APPEAL

1. Is that portion of the Indiana Code, Section 35-45-4-1, specifically (a) (3), which prohibits a female from appearing nude "in a public place" in conflict with the free speech clause of the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment for the reason that the statute is overbroad on its face?

2. Does the Appellant Sue Clark have the necessary standing to raise an overbreadth challenge to the constitutionality of Indiana Code 35-45-4-1 (a)(3)?

STATEMENT OF THE CASE

On November 17, 1977, Appellant commenced this action by the filing of a complaint for declaratory judgment against the State of Indiana wherein she alleged that a portion of the Indiana Public Indecency statute namely, I.C. 35-45-4-1 (a)(3), was an unconstitutional infringement on her rights under the First Amendment and that the statute was overbroad. This action was necessary and timely because the statute in question had not become effective until October 1, 1977. After the original complaint was amended to include the local county prosecutor, the State of Indiana appeared by the Attorney General's Office and the Lake County Prosecutor appeared in person and by counsel. The Attorney General's Office filed a motion to dismiss and the Lake County Prosecutor filed a motion for judgment on the pleadings. The substance of both motions was basically that the Appellant did not have standing to raise the overbreadth issue and also that the First Amendment does not protect nude dancing because such activity is conduct rather than protected speech or expression. These motions were dismissed by the trial court.

A short evidentiary hearing was held on February 24, 1978, after which the motion to dismiss and motion for judgment on the pleadings were renewed. At that hearing, the Appellant testified that her sole employment was the work she did as a dancer and further that she had been a professional dancer for approximately ten (10) years. She stated that she had been employed at a lounge in Gary, Indiana, for about one and one-half years and that prior to October 1, 1977, she performed a part of her dance routine in the nude. Her testimony also set out that she no longer performed in the nude because of the threat of arrest and that as a result of the elimination of the nude portion of her dance routine she suffered a decrease in wages of $200.00 per week. This testimony was uncontroverted. At that point the trial court heard legal argument and the matter was taken under advisement.

The decision of the trial court was entered on May 9, 1978, by way of the Judgment and Decree which appears as Appendix B to this Statement. In that judgment the trial court again denied the motion to dismiss and the motion for judgment on the pleadings. In the judgment, the trial court specifically addressed the constitutional issues raised by this Statement. The trial court stated in Paragraph 6 "[t]hat nude dancing under some circumstances is a protected form of expression under the First Amendment to the Constitution of the United States" (p. App. 21) and then in Paragraph 7 went on to say "[t]hat Indiana Code 35-45-4-1(a)(3) violates the First Amendment of the Constitution of the United States in that same is overbroad prohibiting nude dancing in any public place under any circumstances." (p. App. 21).

The judgment of the trial court was then appealed by the State of Indiana and the Lake County Prosecutor. The appeal went directly to the Supreme Court of Indiana pur-

suant to Indiana Appellate Rule 4(A)(8) which gives the Court exclusive jurisdiction of an appellate case where a state statute has been declared to be unconstitutional. The appeal was filed in a timely manner and briefs were submitted by the opposing parties. A judgment based upon a 3-2 decision for the reversal was entered by the Supreme Court of Indiana on December 3, 1979. In that judgment and opinion the Court also consolidated and reversed two other appeals which had, at least in part, raised that same issue of constitutionality and overbreadth. One of those appeals had itself consolidated eleven dismissals of criminal charges for indecent exposure and the other involved a complaint by three businesses for an injunction and restraining order. In each case the trial court had declared the Indiana statute to be overbroad and therefore unconstitutional.

The Supreme Court of Indiana specifically rejected the overbreadth contentions advanced below by the Appellant Sue Clark (Appellee Below). This was done in part by finding that a person who dances nude in a barroom is engaged in activity which is mere conduct and not a form of expression protected by the First Amendment (p. App. 15), and also in part by a finding that the Appellant's argument would lead to a conclusion that the State could not prohibit public nudity (p. App. 13).

In rejecting the Appellant's contention that Indiana Code 35-45-4-1 (a)(3) is overbroad, the Supreme Court of Indiana applied and enforced the state statute which the Appellant had, at all stages of the proceedings, insisted was repugnant to the freedom of speech clause of the First Amendment.

THE FEDERAL QUESTION IS SUBSTANTIAL

The Federal question raised by the Appellant here, and at all stages of this action, is substantial because it involves the freedom of speech and expression which is guaranteed under the First Amendment to the Constitution of the United States. Against a constitutional challenge based on overbreadth, the Supreme Court of Indiana has upheld as valid a statute which, in pertinent part, defines public indecency as appearing nude in a public place. I.C. 35-45-4-1 Public Indecency (a) A person who knowingly or intentionally, in a public place: . . . . (3) Appears in a state of nudity; . . . .

The Appellant contends that this statute is unconstitutional on its face because its language clearly sweeps within its prohibited activities all dancing in the nude regardless of the context. Furthermore, it prohibits any appearance by any person in a state of nudity in any public place. Such a blanket prohibition is clearly an infringement of the First Amendment since it is well-established that a dance routine wherein the entertainer appears in the nude may be a form of expression guaranteed by the freedom of speech. This fact was expressed most recently by this Court in *Doran* v. *Salem Inn Inc.*, 422 US 922, 95 S.Ct. 2561, 45 L.Ed2d 648 (1975) and the related cases.

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognize in *California* v. *LaRue*, 409 US 109, 118, 93 S.Ct. 390, 397, 34 L.Ed. 2d 342 (1972) that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program.

> "In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:
>
> > 'The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing 'in any public place' with uncovered breasts. There is no limit to interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance. [Salem Inn, Inc. v. Frank, (E.D.N.Y. 1973) 364 F. Supp. 478, 483.]'
>
> "We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972):
>
> > 'Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge'." 422 U.S. at 933, 95 S.Ct. 2568-9, 45 L.Ed2d at 660.

That language was considered below by the Supreme Court of Indiana and apparently rejected in favor of an interpretation offered by the Attorney General for the State of Indiana which narrowly construed *Doran, supra*, as being interlocutory and therefore not directly resolving the question of the constitutionality of an almost identical

statute. (p. App. 8-9). Furthermore, the Appellee, State of Indiana, placed great emphasis on the word "might" in the phrase "might be entitled to First Amendment protection under some circumstances."

While the Appellant agrees that *Doran, supra,* arose as an interlocutory matter, the language from Justice Rehnquist's opinion quoted above is clear in its statement of the law. A statute such as Indiana Code 35-45-4-1 (a)(3) which prohibits one from appearing nude "in a public place" or "in any public place" is overbroad because it sweeps within its ambit protected speech or expression. As for the undue emphasis placed upon the word "might" by the Supreme Court of Indiana, the Appellant notes that the only circumstances under which the United States Supreme Court has allowed a ban on nude dancing has been when a state has included the ban as part of its liquor licensing program, and then, only to the extent of banning that activity on licensed premises. *California* v. *LaRue* 93 S.Ct. 390, 409 US 109, 34 L.Ed 2d 342 (1972). Clearly the Indiana statute is not limited in its scope to only those places or areas where alcoholic beverages are sold under state license.

A substantial portion of the decision by the Supreme Court of Indiana is directed toward an attack upon the Appellant's standing to raise the issue of constitutionality and overbreadth. An indicative sampling is as follows:

> "This is a claim for some kind of right to appear nude in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim." (p. App. 15).

The Appellant contends that because one engages in the activity of nude dancing for payment does not in itself reduce the activity below that which is protected by the First Amendment. One can be certain that any performer in a commercial ballet or theatre production is paid, and

in some instances extremely well paid. Payment does not reduce the appellant's activity to mere conduct not protected by the First Amendment. Were this in fact true, the Appellant might lose her standing to raise the rights of others. However, there is no question that nude dancing, paid or unpaid, is a form of speech and expression and as such it is entitled to constitutional protection under the First and Fourteenth Amendment. *Doran* v. *Salem Inn, Inc.* 422 US 922, 95 S.Ct. 2561, 45 L.Ed. 2d 648 (1975); *California* v. *LaRue,* 93 S.Ct. 390, 409 US 109, 34 L.Ed. 2d 342 (1972). Furthermore, even if this particular statute, Indiana Code 35-45-4-1 (a)(3), could somehow be constitutionally applied to the dancing activities of this particular Appellant, that person may rightfully challenge the statute if it is drawn so broad as to include the speech and expression of persons not before this Court. *Doran* v. *Salem Inn, Inc.,* 422 US 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) and *Grayned* v. *City of Rockford,* 92 Sup.Ct. 2294, 408 US 104, 33 L.Ed 2d 222 (1972).

CONCLUSION

The decision below conflicts with decisions of this Court. It cannot be sustained on the grounds advanced by the court below. The issues clearly involved the Constitution of the United States in that the State statute in question is an invalid infringement on the freedom of speech and expression as guaranteed by the First and the Fourteenth Amendments. For this reason probable jurisdiction should be noted and the case set down for hearing, or, in the alternative, the decision below should be summarily reversed.

Respectfully submitted,

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February 1980.

APPENDIX

APPENDIX A

STATE OF INDIANA v. CONNIE SUE BAYSINGER, ET AL.; STATE OF INDIANA and LAKE COUNTY PROSECUTOR v. SUE CLARK; CITY OF SOUTH BEND, ET AL. v. KITTY KAT LOUNGE, INC.

THE SUPREME COURT OF INDIANA
Nos. 1078 S202, 978 S193, and 1078 S227
December 3, 1979

PIVARNIK, J.

The Indiana Supreme Court has exclusive jurisdiction of these causes pursuant to Ind. R. Ap. P. 4(A)(8) since these are appealable cases in which a state statute, Ind. Code 35-45-4-1 (Burns Supp. 1978) has been held to be unconstitutional by trial courts.

In the *Clark* case plaintiff filed a complaint for declaratory judgment against the State of Indiana which was amended on November 28, 1977. The Lake County Prosecutor's office filed a Motion for Judgment on the pleadings and the Attorney General's office filed a Motion to Dismiss, both of which were denied. After a short evidentiary hearing on February 24, 1978, the State's Motion to Dismiss and Motion for Judgment on the Pleadings were renewed. On May 9, 1978, the court entered judgment finding Indiana Code § 35-45-4-1 (Burns 1978) to be unconstitutional and restraining and enjoining the defendants from enforcing it. This appeal followed.

In *Baysinger,* et al., each of the appellees was charged with indecent exposure pursuant to Ind. Code § 35-45-4-1 (Burns 1978), by informations filed in Allen Superior

Court. A Motion to dismiss was filed on February 16, 1978, alleging vagueness and/or overbreadth. This motion was granted on May 17, 1978, and the cause dismissed. A motion to correct errors was filed and denied. On October 13, 1978, the State's motion for consideration of appeal was granted by order of the Indiana Supreme Court. Pursuant to Ind. R. Ap. P. 5(B) eleven cases were consolidated under Cause No. 1078 S 202 for appeal.

In *Kitty Kat Lounge, Inc., et al.,* the owners and operators of taverns and bars were ordered to cease offering nude dancing as entertainment. Appellees ceased to have nude dancing and filed a complaint for temporary and permanent injunction and restraining order against the State seeking to have Ind. Code § 35-45-4-1 declared unconstitutional, alleging substantial loss of income. Their motion for a permanent injunction was granted upon a finding by the trial court that the nudity provision of Ind. Code § 35-45-5-1 was overbroad and thus unconstitutional. This appeal followed.

For convenience and to avoid unnecessary cost and delay, all of these appeals are consolidated here for opinion pursuant to Ind. R. Ap. P. 5(B). All involve the same conduct, nude dancing or appearances in bars. All involve the action of trial courts declaring Ind. Code § 35-45-4-1 to be unconstitutional. The statute in issue, Ind. Code § 35-45-4-1 (Burns 1978) reads as follows:

> 35-45-4-1. PUBLIC INDECENCY. — (a) A person who knowingly or intentionally in a public place:
>
> (1) Engages in sexual intercourse;
>
> (2) Engages in deviate sexual conduct;
>
> (3) Appears in a state of nudity; or

> (4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [IC 35-45-4-1, as added by Acts 1976, P.L. 148, § 5, p. 718; 1977, P.L. 340, § 76, p. 1533.)

In considering the issue of the constitutionality of a statute,

> "We recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, every statute stands before us clothed with the presumption of constitutionality and such presumption continues until clearly overcome by a showing to the contrary. In the deliberative process, the burden is upon the challenger to overcome such presumption, and all doubts are resolved against his charge."

Sidle v. *Majors,* (1976), 264 Ind. 206 [51 Ind.Dec. 246, 249], 341 N.E.2d 763, 766.

I. The State alleges error in the lower courts finding that the statute was vague and claims error in that the lower courts failed in their duty to give the statute a reasonable interpretation. Appellees contend that because the term "public place" was undefined in the statute, the statute is unconstitutionally vague. The question involved in such an inquiry is whether a challenged law is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926). As the State has pointed out, the conduct involved here, i.e., nude

dancing and appearances in taverns and bars, is clearly conduct in a "public place."

In Indiana, the definition of public indecency and public place has been considered and was early limited by the Court itself. In *McJunkins and Others* v. *The State* (1858), 10 Ind. 140, 145, involving a determination that certain improprieties of language were not intended to be included as a punishable offense under a charge of public indecency, the Court noted that:

> "It would therefore appear that the term public *indecency* has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense. And hence, the Courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster—acts which have a direct bearing on public morals, and affect the body of society."

In *Ardery* v. *State* (1877), 56 Ind. 328, the Supreme Court faced the issue of whether or not the offense of public indecency, not being defined by statute, was punishable.

> "The enquiry, therefore, arises for this court to answer, is the exposure, in a public place, to divers persons there assembled, by a person, of his or her private parts, a public indecency? *Prima facie,* we think it is, if there is in the world any such thing as public indecency."

In commenting that there had existed such a thing as decency and such a thing as indecency since the time of Adam and Eve, the court affirmed the judgment even though "decency" forbade that the parts exposed be named in the statute.

During the intervening years, many standards have changed and statutes have been drawn more specifically and explicitly. Nevertheless, it appears that the basis for the offense of public indecency remain the same. The word public was further defined in *Peachey* v. *Boswell* (1960), 240 Ind. 604, 167 N.E.2d 48, 56-57, in discussing the phrase, "In any place accessible to the public" with reference to a gambling statute. We stated as follows:

> "Webster defines "public" as "open to common and general use, participation, or enjoyment of the public. It has been held that the term "public place" as used in statutes pertaining to gambling includes any place which for the time being is made public by the assemblage of people who go there with or without invitation and without restraint. *Roberts* v. *State,* 1908, 4 Ga. App. 207, 60 S.E. 1082, 1085.
>
> A place may be accessible to the public for gambling notwithstanding that every person who desires is not permitted access thereto. Lockhart v. State, 1853, 10 Tex. 276, 276."
>
> "It has also been held that in a case involving a prohibition law that by "public" is meant that the public is invited to come to the place and has access to it for the purpose within the scope of the business there maintained. Brooks v. State, 1916, 19 Ga. App. 3, 90 S.E. 989, 991.
>
> "Accessible to the public" as used in the Act here in question has not been defined by either of the courts of appeal of this State, nor have we been able to find definition by the courts in other jurisdictions.
>
> From a consideration of the terms "accessible", "public", and "public place", as defined hereinabove, together with the purpose of the Act, we have con-

cluded that the phrase "in any place accessible to the public" as used in §10-2330, supra, means any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public."

We find no merit in the contention that the statute is vague because the word public is undefined.

II. Appellants claim error in the trial court's finding that the statute is defective because of overbreadth, that is, that even if the meaning of the statute is clear, and, even though a nude dancer would know that her public nudity is a prohibited activity, the statute is unconstitutional if it sweeps too broad and regulates activities which cannot constitutionally be regulated. Consideration of this issue involves several claims. One is that because the appellees make their claim as a First Amendment claim, they may raise the rights of others, although there is no question that their conduct properly falls within the statute. This assertion of overbreadth depends initially upon a determination that the rights asserted are properly First Amendment rights and that therefore, they are entitled to consideration under the overbreadth doctrine.

This argument must have as its base that the activity involved here, appearing nude in bars and taverns and nude dancing in bars, is entitled to First Amendment protection. Appellees additionally argue that a statute directed at public nudity which does not limit its prohibition to certain sexual activity combined with nudity, or one which prohibits all "public nudity" is unconstitutionally overbroad because some protected activity may be deterred. In other words, appellees argue that if there is any protected expression that could be included under a category of nudity in "public", this possibility would require our finding the

public indecency statute to be overbroad. They claim that all prohibitions must be struck down unless somehow narrowed or tied to other regulations. They argue that if a statute could be read so as to prohibit not only topless and/or bottomless dancing in a tavern but also a production of the Ballet Africains at a public auditorium, then the statute is unconstitutionally overbroad. Appellees also include in this argument concerns that "public place" may also apply to restrooms, shower rooms, saunas, and locker rooms.

In support of this argument appellees quote at length from cases arising in New York which went to the United States Supreme Court. In 1973, the town of North Hempstead, New York enacted an ordinance prohibiting topless entertainment. Three bar owners challenged the ordinance on its face.

A temporary restraining order was refused. One owner continued to offer topless entertainment and was served with criminal process. The other two owners refrained. A temporary injunction was issued. The Federal district court refused to abstain pending the state criminal proceedings and held that the ordinance was overbroad. *Salem Inn, Inc.,* v. *Frank,* 364 F. Supp. 478 (E.D.N.Y. 1973). The Second Circuit Court of Appeals affirmed at 501 F.2d 18 (1974). The United States Supreme Court granted certiorari and affirmed the temporary injunction as to the two owners but reversed as to the other, holding that abstention was required. *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). The court held that the district court did not abuse its discretion in finding that the ordinance was probably overbroad, thus justifying the injunction.

Appellees quote from the *Doran* opinion in support of their position as follows:

" 'The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance.'' 364 F.Supp., at 483.

We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, the defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in Grayned v. City of Rockford, 408 U.S. 104, 114 (1972):

> 'Because overbroad laws, like vague ones, deter privileged activity, our cases firmly established appellant's standing to raise an overbreadth challenge.' ''

Doran v. *Salem Inn, Inc.* (1975), 422 U.S. 922, 933, 95 S.Ct. 2561, 2568-69, 45 L.Ed.2d 648, 660. Appellees argue that this case requires the striking down of any "across the board" regulation of nudity.

The State, emphasizing the part of this opinion which refrains from stating a view on the merits argues that all *Doran, supra,* holds is that this form of entertainment, i.e., nude dancing, might be entitled to First and Fourteenth Amendment protection under some circumstances and that *Doran* is merely an interlocutory appeal and did not resolve the question of the constitutionality of the statute. The appellants also allege error in the trial court finding the

statute overbroad, arguing that the activity involved is conduct, not speech, and that, therefore, challenge based on alleged facial invalidity is not available to appellees.

California v. *LaRue* (1972), 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, *reh. denied,* 410 U.S. 948, 93 S.Ct. 1351, 35 L.Ed.2d 615, held that in view of the State's broad authority to control the sale of intoxicating liquors under the Twenty-first Amendment, regulations proscribing some acts which were not obscene and possibly within the limits of the First and Fourteenth Amendments' protection of freedom of expression did not violate the Federal Constitution. The specific portion of *LaRue* upon which the court in *Doran* relied is as follows:

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the De-

> partment sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."

409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342, 352. However, in *LaRue* the court also distinguished between written expression and the public acts as follows:

> "But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action'"

Id. at 117, 93 S.Ct. at 396, 34 L.Ed.2d at 351.

We read *LaRue* to caution against attempting to censor dramatic performances in theaters or in movies, which may be protected expression. As noted in *Crownover* v. *Musick* (1973), 107 Cal. Reptr. 681, 509 P.3d 497, *cert. den. sub nom., Owen* v. *Musick,* 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed. 2d 489 (1974):

> "A close reading of the *LaRue* opinion reveals that the only area of regulation involved in that case which the Supreme Court found within the limits of the constitutional protection of freedom of expression was that of motion pictures and theatrical productions."

See also Gabriel v. *Town of Old Orchard Bench* (1978); *People* v. *Karns,* 81 Misc.2d 186, 365 N.Y.S.2d 725 (Cty. Ct. Rochester, Monroe Co. 1975); *Kew* v. *Senter,* 416 F. Supp. 1101 (N.D. Tex. 1976).

We recognize the existence of cases cited by the appellees to indicate that some courts have held that the regulation of nude dancing through public indecency statutes or

ordinances, when such laws are not tied to the regulation of alcoholic beverages, may be unconstitutional. *See New York Topless Bar and Dancers Assoc.* v. *New York State Liquor Authority,* 398 N.Y.S.2d 637, 637 n. 2 (N.Y. Sup. Ct. 1977); *People* v. *Nixon,* 390 N.Y.S.2d 518 (Sup.Ct. 1976); *Lucifers Gate, Inc.* v. *Town of Van Buren,* 373 N.Y.S.2d 304 (Sup. Ct. 1975). Other courts in other jurisdictions have held similar statutes to be overbroad, *Jamaica Inn, Inc.,* v. *Daley,* 368 N.E.2d 589 (Ill. App. 1977).

Other courts have attempted to construe the term public place in public indecency laws to exclude places where persons willing enter. *See Yauch* v. *State,* 514 P.2d 709 (Ariz. 1973); *State* v. *Brooks,* 550 P.2d 440 (Ore. 1976).

It is obvious that the area is confused by the consideration of overlapping concepts of nudity, public indecency, and obscenity in differing contexts.

Appellees assert that even though the conduct involved here is nudity in public and clearly would fall within the prohibitions of the statute, the legislature is unable to prohibit such conduct unless the statute includes requirements of a showing that the nudity involved is obscene. Apparently this concept is traceable to cases primarily dealing with other areas and performances such as films, books, and the theatrical performances. *See Erzoznik* v. *City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (films); *Southeastern Promotions, Ltd.* v. *Conrad* (1975), 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (prior restraint of stage production of *Hair*).

Cases involving such issues have continued to maintain certain distinctions between such concepts and to acknowledge that indecent public conduct is not included in the express exceptions allowed on the basis of the First Amendment. In the "Carnal Knowledge" film case, *Jenkins* v. *Georgia* (1974), 418 U.S. 153, 161, 94 S.Ct. 2750, 2755, 41

L.Ed.2d 642, 650, nudity and obscenity were discussed, and it was stated that nudity alone was not enough to make material legally obscene citing *Miller* v. *California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. However, the *Miller* case itself noted that:

> "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior."

413 U.S. at 26, 93 S.Ct. at 2616, n. 8.

In *Erzoznik* v. *City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) a local ordinance was passed which prohibited the showing of films containing nudity by a drive-in theater when its screen was visible from a public street or place. The Supreme Court held the ordinance unconstitutional. However, the Court added in a footnote:

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. . . . ('No one would suggest that the First Amendment permits nudity in a public place'). (citations omitted) *Id.* at 211, 95 S.Ct. at 2273, n. 7."

Thus it appears that certain public conduct which involves nudity may be regulated on a standard different from that provided for movies or books. Here we note the existence of Ind. Code § 35-30-10.1-1 et seq. (Burns 1975) which may more properly be applied to such materials and performances and includes obscenity criteria. However, it appears obvious that as the content of the written material, motion

picture, pictorial representation or live performance diminishes and we approach simply appearing nude in public, determining whether or not nudity is obscene becomes extremely difficult because the context is so limited. Therefore, the application of obscenity considerations to books, films and certain types of live musical or theatrical performances or productions seems more appropriate. In those settings, nudity, which may or may not be obscene, may be judged as are all other components of such materials or performances, in the context on which it is presented. There is sufficient content to enable courts to determine whether or not such nudity is obscene and therefore prohibited or whether, taken in its context, it is not obscene and requires protection as expression. However, the legislature is not required to provide for proof of obscenity before public nudity may be prohibited.

In appellees final and main contention they claim that this statute must fall because it could, in some other fact situations be used to suppress protected expression. These situations, it is alleged, could involve nudity within the context of a play, ballet, movie, book or other material. Thus, the argument goes that because of the potential for restriction of material or performances involving the communication of ideas, or speech, it is constitutionally required to tolerate or to allow some nudity in some contexts as part of some larger form of expression. Appellees argue that we must therefore conclude that we may not prohibit public nudity. We do not find this persuasive.

Consideration of their claim that the public indecency statute is overbroad requires a review of that basic doctrine. In *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830, the United States Supreme Court held that in general, constitutional rights are personal and the Court will consider only the allegations of unconstitutionality in a particular fact situation which the

plaintiff has brought to court. An exception to this general rule allows a challenge of alleged facial invalidity in the area of free speech. However, this exception is limited.

> ". . . But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protective speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. (citation omitted). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Id. at 615, 93 S.Ct. at 2917-18, 37 L.Ed.2d at 842.

Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been able to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the

final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances. Under these facts the argument that Ind. Code § 35-45-4-1 (Burns 1978) is overbroad must fail. Certainly the presumption of constitutionality with which each statute is clothed is not clearly overcome. We reverse the judgments of the lower courts, order the injunctions issued to be lifted, and declare Ind. Code § 35-45-4-1 to be constitutional as a valid exercise of the police powers of the state.

Givan, C.J., and Prentice, J., concur.

Hunter, J., and DeBruler, J., dissent with separate opinions.

DISSENTING

DEBRULER, J.

In my opinion the judgments of the trial courts below should be affirmed. In *State* v. *Baysinger and others,* No. 1978 S 202, appellees were charged with appearing in a state of nudity by showing the female breasts and buttocks with less than a fully opaque covering of the nipples and buttocks at a night club, The Scorpion, in violation of Ind. Code § 35-45-4-1 (Burns 1978). Appellees filed a motion to dismiss and discharge contending that the statute was unconstitutional and the trial court sustained the motion. The judgments in the other two cases arose in different postures, but are to the same effect, i.e., that Ind. Code § 35-45-4-1 is unconstitutional on its face for reasons of overbreadth insofar as it proscribes public nudity in public places. That part of the statute dealing with public nudity applicable here provides:

> "(a) A person who knowingly or intentionally, in a public place:
>
> (3) Appears in a state of nudity;
>
> . . .
>
> commits public indecency, a class A misdemeanor.
>
> (b) 'Nudity' means the showing of the human male or female . . . buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple. . . ."

In *Grody* v. *State* (1972), 257 Ind. 651 (29 Ind.Dec. 214], 278 N.E.2d 280, this Court invalidated a state criminal statute because of unconstitutional overbreadth and there described the doctrine as follows:

> "A penal statute is unconstitutionally overbroad if its sanctions are applicable to activities that are protected

> by the First Amendment. Coates v. Cincinnati (1971), 402 U.S. 611, 91 S.Ct., 1786, 29 L.Ed.2d 214. . . . The invalidity of such a statute rests on the fact that it constitutes a substantial deterrent to the free exercise of important First Amendment rights." ([29 Ind.Dec. at 215] 257 Ind. at 653.

The issue presented here then is whether a person could be criminally liable under Ind. Code § 35-45-4-1, for engaging in conduct protected by the First Amendment. The crime defined by this statute occurs when a female person appears at any time, in any manner, in any public place, for any purpose, with naked breast. The statute is indifferent to verbal or other conduct in which the person may be engaged at the time or the presence and rights of others who may be in the same place at the same time. This statute would empower law enforcement officials to arrest and prosecute a nude woman dancer or actress in a professional stage production or a nude woman engaged in a public meeting the purpose of which is to educate about and encourage infant breast feeding or self-examination for breast cancer. It would permit the arrest and prosecution of models who may pose in the nude for art classes at our state universities. Activites of these sorts involving live performances, the dance, and educational activities are afforded the broadest First Amendment protection. *Schacht* v. *United States* (1970), 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed. 2d 44; *California* v. *LaRue* (1972), 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342; *Doran* v. *Salem Inn, Inc.,* (1975), 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648. This statute is clearly unconstitutionally overbroad. Furthermore, the statute is so grossly overbroad that no court could construe it so as to render it free from this constitutional defect as to do so would require the court to exercise a legislative authority, a role we cannot assume. *Grody* v. *State, supra.*

DISSENTING

HUNTER, J.

I must dissent from the majority opinion in this case. I would ascribe greater weight than does the majority to the following language from Justice Rehnquist's opinion in *Doran* v. *Salem Inn, Inc.* (1975), 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648.

"The District Court observed, we believe correctly:

> " 'The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place' with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance.' [*Salem Inn, Inc.* v. *Frank* (E.D.N.Y. 1973), 364 F. Supp. 478, 483.)

"We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in Grayned v. City of Rockford, 408 US 104, 114, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972):

> " 'Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.' "

422 U.S. at 933, 95 S.Ct. 2568-9, 45 L.Ed.2d at 660.

The majority emphasizes that the Court held that nude dancing "might be entitled to First and Fourteenth Amendment protection under some circumstances." 422 U.S. at 932, 95 S.Ct. at 2568, 45 L.Ed.2d at 660. Yet, the only circumstance under which the United States Supreme Court has allowed a ban on nude dancing has been when a state has included the ban as part of its liquor license program. *California* v. *LaRue* (1972), 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342. The purview of Indiana's public indecency statute is not limited to establishments where alcoholic beverages are served. The statute is couched in terms of nudity "in a public place." West's Ann. Ind. Code § 35-45-4-1 (1978).

I believe the quoted language from *Doran's Salem Inn. Inc., supra,* stands for the proposition that a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. See *Jamaica Inn, Inc.* v. *Daley* (1977), 53 Ill. App. 3d 257, 368 N.E.2d 589.

I would affirm the judgments of the trial courts below.

APPENDIX B

IN THE LAKE SUPERIOR COURT ROOM NO. THREE
SITTING AT GARY, LAKE COUNTY, INDIANA.

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

SUE CLARK

Plaintiff

vs.

STATE OF INDIANA and
LAKE COUNTY PROSECUTOR

Defendants

Cause No. 377-1615

JUDGMENT AND DECREE

The parties being present in court, in person and by counsel on the 24th day of February, 1978, and the Court having heard all of the evidence in this cause and considered all of the pleadings and memorandums filed herein along with arguments of counsel now finds as follows:

1. That the Court has jurisdiction of the parties and the subject matter.

2. That the Motions To Dismiss and Motions For Judgment on the Pleadings filed by Defendants herein should be and are denied.

3. That this matter is before the Court on its merits for Declaratory Judgment pursuant to Indiana Code

34-4-10-1 regarding the constitutionality of that part of Indiana Code 35-45-4-1 which reads as follows:

> Public indecency [effective October 1, 1977]. (a) A person who knowingly or intentionally, in a public place:
>
> . . . (3) Appears in a state of nudity: . . . commits public indecency, a Class A misdemeanor.

and in addition, the Plaintiff has prayed for injunctive relief thereon.

4. That continued enforcement of the above statute affects Plaintiff in her trade and occupation.

5. That nude dancing is a part of and included within Plaintiff's trade and occupation.

6. That nude dancing under some circumstances is a protected form of expression under the First Amendment to the Constitution of the United States.

7. That Indiana Code 35-45-4-1 (a) (3) violates the First Amendment of the Constitution of the United States in that same is overbroad prohibiting nude dancing in any public place under any circumstances.

8. The law is with the Plaintiff.

9. The law is against the Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Indiana Code 35-45-4-1 which reads as follows:

> Public indecency [effective October 1, 1977]. (a) A person who knowingly or intentionally, in a public place:
>
> . . . (3) Appears in a state of nudity: . . . commits public indecency, a Class A Misdemeanor.

is unconstitutional and that the Defendants are restrained and enjoined from enforcing same.

Dated this 9 day of May, 1978.

/s/ *James Danikolas*
Honorable James Danikolas
Judge, Lake Superior Court
Room Number Three

Filed May 9, 1978
Nick Krochta,
Clerk Lake Superior Court